

IN THE SUPREME COURT OF MISSOURI

CENTRAL TRUST AND INVESTMENT)	
COMPANY,)	
)	
Plaintiff/Appellant,)	
)	
VS.)	Cause No. SC93182
)	
TROY KENNEDY AND ITI FINANCIAL)	
MANAGEMENT, LLC,)	
)	
Defendants,)	
)	
AND)	
)	
SIGNALPOINT ASSET MANAGEMENT,)	
LLC,)	
)	
Defendant/Respondent.)	

Appeal from the Circuit Court of Greene County, Thirty-First Judicial Circuit
Greene County Circuit Court Case No. 1031CV00117
The Honorable Michael J. Cordonnier, Circuit Judge

**APPELLANT CENTRAL TRUST & INVESTMENT COMPANY'S
SUBSTITUTE REPLY BRIEF**

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

Appellant, Central Trust & Investment Company (“Appellant” or “Central Trust”), submits this Substitute Reply Brief in response to Respondent’s Substitute Brief filed by SignalPoint Asset Management, LLC (“Respondent” or “SignalPoint”).

APPELLANT’S REPLY TO RESPONDENT’S STATEMENT OF FACTS

Rules 84.04(c) and 84.04(f) require SignalPoint to, if dissatisfied with Central Trust’s Statement of Facts in its Appellant’s Substitute Brief, present a “fair and concise statement of the facts relevant to the questions presented for determination **without argument.**” Mo. R. Civ. Pro. 84.04(c) and 84.04(f) (2013). (Emphasis added). A careful reading of SignalPoint’s “Statement of Facts” exhibits its failure to comply with these rules. As such, SignalPoint’s position on Central Trust’s Statement of Facts is, at best, hypocritical. SignalPoint spent an inordinate amount of time “nit-picking” Central Trust’s Statement of the Facts in a thinly veiled attempt to misdirect this Court’s attention away from the substantive issues facing this Court. SignalPoint’s arguments are nothing more than ineffective red-herrings designed to discredit Central Trust. SignalPoint’s actions demonstrate that it has little confidence concerning its position on the issues before this Court.

It is apparent from SignalPoint’s “Statement of Facts” it really had little to argue regarding the material set forth in Central Trust’s Statement of Facts. SignalPoint spent the first 4 pages of its Substitute Brief in a circular argument that is difficult to decipher, criticizing Central Trust over what are immaterial facts that have little, if any, impact on the issues. Apparently, SignalPoint believes that if it “denied” a fact asserted by Central

Trust, that fact cannot be used as support to deny summary judgment. Contrary to SignalPoint's position, such disputed facts are a critical part of a Court's review of a summary judgment ruling. It has been axiomatic since the creation of summary judgment rules that disputed questions of material fact defeat summary judgment. When Central Trust denied SignalPoint's questions of material fact, Central Trust's denial did not eliminate that fact from further consideration as SignalPoint seems to assert. Instead, SignalPoint's denial of the fact created a disputed question of material fact, thus, demonstrating that summary judgment in SignalPoint's favor was improper.

In its summary judgment pleadings, SignalPoint set forth 175 facts it labeled as "Defendant SignalPoint Asset Management, LLC's Statement of Facts." (LF 146-411). Central Trust, the defending party, denied 64 of those facts. (LF 426-503). In its summary judgment pleadings, Central Trust set forth 147 facts it labeled as "Statement of Additional Material Facts." (LF 556-576). It appears from the docket sheet in this case and the record on appeal that SignalPoint failed to file a response to Central Trust's statement of Additional Material Facts. (LF 1-16; *see generally* entire Legal File). Therefore, Central Trust's Additional Material Facts are deemed admitted and are not controverted by SignalPoint. Clearly, with Central Trust's denials to SignalPoint's facts and its own facts that were uncontroverted by SignalPoint, there were disputed facts that precluded summary judgment. It was SignalPoint's duty to present sufficient uncontroverted material facts which entitled it to judgment in its favor, and, in turn, Central Trust's duty to deny and controvert these "uncontroverted" facts. Although this Court's review in this case is *de novo*, the trial court did not issue findings of fact or a

detailed judgment setting forth the basis or the facts material to its ruling in SignalPoint’s favor. SignalPoint’s cherry-picking of certain facts it deems were improperly denied by Central Trust or unsupported by the record provides nothing informative to this Court and is of no significance.

SignalPoint made the same attack on Central Trust’s statement of facts in the appellate court. Although Central Trust stood by its statement of facts, in an abundance of caution, Central Trust removed the complained-of facts from its Substitute Brief. Central Trust took this action primarily because the complained-of facts were immaterial to this appeal. Apparently, SignalPoint did not carefully read Central Trust’s statement of facts in its Substitute Brief. Either way, a purported “Statement of Facts” is not the place to make arguments.

Central Trust refiled its case against Kennedy and ITI, original co-defendants in the underlying case, the same day it dismissed its claims against them.

Although SignalPoint noted that Central Trust voluntarily dismissed its claims against Troy Kennedy (“Kennedy”) and ITI Financial Management, LLC (“ITI”) on November 14, 2011, it failed to mention that Central Trust refiled its Petition on the same day. Central Trust’s new Petition named two new defendants, Marla Witthar (“Witthar”) and Heather Landwer (“Landwer”), and added claims to the case. Central Trust asserted several causes of action against Kennedy, ITI, Witthar and Landwer, including misappropriation of trade secrets, civil conspiracy, breach of contract, breach of duty of loyalty, breach of fiduciary duty, and tortious interference with business relations. Respondent’s inference that it is the only party against whom Central Trust has pending

claims remaining is wholly inaccurate.

Central Trust’s Statement of Facts accurately refers to and reflects the substance of the pleadings contained in the Legal File.

Central Trust’s Statement of Facts accurately refers to the pleadings filed in the underlying case and contained in the Legal File and Supplemental Legal File. Anything more than a cursory review of Respondent’s Statement of Facts reveals its faults and errors. SignalPoint’s recitation of a largely argumentative Statement of Facts is Respondent’s attempt to sway this Court away from other material and uncontroverted facts asserted by Central Trust. The relevant and disputed facts SignalPoint ignores serve to prevent summary judgment in favor of SignalPoint. Without Central Trust’s Statement of Facts, SignalPoint’s facts paint an inaccurate picture of the factually intensive background of this case. For example, in its Statement of Facts filed with its Motion for Summary Judgment, SignalPoint asserted, “Troy Kennedy solicited clients of Central Trust Investment Company.” (LF 146). This assertion also appears in Respondent’s Substitute Brief. (Respondent’s Substitute Brief, page 4). This assertion is misleading because it is only partially true and fails to accurately represent the entire story. The record reflects that Kennedy admitted he also solicited clients ***before*** he left Central Trust. (LF 1003). This undisputed and material fact is only one example of many where Central Trust tells the complete story.

Supreme Court Rule 74.04(c)(2) allows a party responding to a summary judgment motion, to set forth “additional material facts that remain in dispute.” SignalPoint incredibly urges this Court to believe that the 175 facts asserted in its

Statement of Facts filed with its Summary Judgment Motion were, in fact, uncontroverted and material facts supporting its Motion for Summary Judgment. (LF 146-166). Such is not the case. Those facts that were disputed were noted by Central Trust in its response to the trial court. Further, the majority of the facts asserted by SignalPoint were neither material nor uncontroverted. (LF 426-503).

Kennedy breached the Kennedy Employment Contract before Central Trust purchased Springfield Trustshares and Springfield Trust & Investment Company (collectively, “STC”).

According to SignalPoint’s interpretation of the record, after Central Trust purchased STC, Kennedy’s Employment Contract became void and unenforceable. SignalPoint asserts that after the sale, Kennedy solicited Central Trust’s clients. Such is not the case. What SignalPoint ignores is that the undisputed facts demonstrate that, while an officer and director of STC, Kennedy began soliciting clients, employees and competitors of STC and Central Trust before the STC sale to Central Trust occurred, and continued to do so after the sale occurred. Central Trust asserts his actions prior to the termination of employment constituted a breach of his Employment Contract. (LF 1003, 505, 1009, 1010). While serving as an officer and director of STC and while still employed by STC, Kennedy took a cell phone with 200 client identities and 39 pages of customer lists (STC/Central Trust trade secrets) and placed them in a safe deposit box on the advice of his counsel. (LF 1006). John Courtney of STC considered Kennedy’s pre-sale conduct a breach of the Kennedy Employment Contract. (LF 1004).

As argued in Appellant's Substitute Brief, Kennedy's pre-separation activities, which were breaches of the Employment Contract and his duties as an officer and director of STC, improperly benefitted SignalPoint. SignalPoint's erroneous interpretation of the Employment Contract without acknowledging undisputed facts concerning Kennedy's prior breach of the Employment Contract improperly distorts the true facts of this case and does not shield SignalPoint.

The "Client Lists" are, indeed, contained in the record before the trial court, before the court of appeals, and now before this Court.

For the first time, SignalPoint argues that the Client Lists were not part of the record before the trial court and now the record on appeal. (Respondent's Substitute Brief, pg. 17). Because Kennedy and his counsel failed to comply with Missouri Rules of Civil Procedure and supplement their production of documents to include the Client Lists after Kennedy disclosed he possessed them in his May 10, 2011, deposition and before the trial court granted summary judgment in SignalPoint's favor, neither Central Trust nor the trial court had the Client Lists before the trial court entered judgment. However, the trial court did have the Client Lists at the time Central Trust filed its Motion for Reconsideration of Summary Judgment Entered in Favor of Defendant SignalPoint on its Motion for Summary Judgment and for New Trial on the Merits. (LF 1108 – 1125). Central Trust filed the Client Lists under seal with the trial court as Exhibit "E" attached to its Motion. (LF 1124). Central Trust's counsel sought guidance from the clerk of the court of appeals when putting together the record on appeal. The clerk instructed counsel to file the record on appeal in its present form and stated that because Exhibit "E" was

filed under seal, the judges would request the sealed Exhibit from the trial court if needed. (LF 1124). There is no question that Exhibit “E” is part of this appeal.

ARGUMENT

I. *Whether Central Trust’s Client Information and Client Lists are trade secrets under the Missouri Uniform Trade Secrets Act (“MUTSA”) is a “conclusion of law based on the applicable facts,” not simply a question of law as boldly stated but Respondent.*

SignalPoint argued that “The Determination That Central Trust Has No Trade Secret Is A Question of Law.” (Respondent’s Substitute Brief, pg. 21). This assertion is simply not the law of the state of Missouri, and not the law of the overwhelming majority of states who have adopted the Uniform Trade Secrets Act as discussed, *infra*. The error of SignalPoint’s argument is further evidenced by SignalPoint’s complete failure to cite to caselaw supporting this proposition. Presumably, SignalPoint is not making this argument seeking a change in the law. To the contrary, it is asserting that its position is the law of Missouri. In making this argument, SignalPoint not only misinterprets clear Missouri precedent, but ignores authority of other jurisdictions which have interpreted the UTSA in a manner contrary to SignalPoint’s interpretation. The *Lyn-Flex West, Inc.* opinion, and its progeny, simply do not support SignalPoint’s brazen and desperate assertion. *See Lyn-Flex West, Inc. v. Dieckhaus*, 24 S.W.3d 693 (Mo. App. E.D. 1999).

SignalPoint indecorously urges this Court to interpret dicta in *Lyn-Flex West, Inc.*, as standing for the proposition that the question of whether a trade secret exists is an issue of law for the trial court to determine. As argued in Central Trust’s Substitute

Appellant’s Brief and as specifically stated by the *Lyn-Flex* court, “[t]he existence of a trade secret is a conclusion of law based on the applicable facts.” *Id.* (citing *Trandes Corp. v. Guy F. Atkinson Co.*, 996 F.2d 655, 661 (4th Cir. 1993) (applying the Maryland version of the Uniform Trade Secrets Act) (citing *Operations Research, Inc. v. Davidson & Talbird, Inc.*, 217 A.2d 375, 379 (Md. 1966) (citing *Space Aero Products Co. v. R. E. Darling Co.*, 208 A.2d 74, 105-6 (Md. 1965) (“The legal principles are not in dispute; it is their application to the particular facts on which, in general, the decisions turn”))). This issue should be determined by the Court in accordance with Missouri precedent and the decisions of a majority of courts who have adopted the UTSA. The ruling of this Court cannot be supported by mere dicta. *Board of Educ. of City of St. Louis v. Daly*, 272 S.W.3d 228, 238 (Mo. App. E.D. 2008).

Notably missing from SignalPoint’s argument is any mention or attempt to distinguish *Titan Intern. Inc. v. Bridgestone Firestone North America Tire, LLC*, case discussed in Central Trust’s Substitute Brief. (Central Trust Substitute Brief, pg. 33-34). SignalPoint ignored the *Titan Intern, Inc.* opinion because it supports Central Trust’s assertion of the proper legal standard to apply when determining the existence of a trade secret. *Titan Intern, Inc.* also sets forth a practical method courts can use when addressing such mixed questions of law and fact. Despite all of SignalPoint’s rhetoric, it is clear that a judge cannot decide questions of fact when presiding over a jury case. *Eagle Star Group, Inc. v. Marcus*, 334 S.W.3d 548, 556 (Mo. App. W.D. 2011). In granting summary judgment in favor of SignalPoint, the trial court decided disputed

questions of fact. This conclusion is inescapable when reviewing the record and demonstrates that the rulings of the trial and appellate courts cannot stand.

Also notably missing from Respondent’s Substitute Brief are references to two recent Missouri federal court cases cited by Central Trust that affirm *Lyn-Flex* and directly decide this issue. See *Cerner Corp. v. Visicu, Inc.*, 667 F.Supp.2d 1062, 1077 (W.D. Mo. 2009). In *Cerner*, the United States District Court for the Western District of Missouri held when issues of fact are disputed concerning the existence of a trade secret, these issues must be resolved by a jury. *Id.* In reaching this conclusion, the *Cerner* Court cited to *Am. Family Mut. Ins. Co. v. Mo. Dep’t of Ins.*, 169 S.W.3d 905, 909–10 (Mo. App. W.D. 2005) and *Lyn-Flex*: “The existence of a trade secret is a conclusion of law based on the applicable facts.” *Am. Family Mut. Ins. Co.*, 169 S.W.3d at 910. “However, if the facts a court uses to determine whether information constitutes a trade secret are disputed, the finder of fact must first resolve those disputes.” *Id.* See, e.g., *Lyn-Flex*, 24 S.W.3d at 698–99 (evidence presented a jury question as to whether a price book was a trade secret for purpose of a misappropriation claim). See also *Secure Energy, Inc. v. Coal Synthetics, LLC*, 708 F.Supp.2d 923, 928 (E.D. Mo. 2010) (holding there is an issue of fact for the jury to decide regarding whether plaintiffs’ engineering plans and drawings are trade secrets) (*citing Gronholz v. Sears, Roebuck & Co.*, 869 F.2d 390, 393 (8th Cir. 1989) (holding “[t]he issue of whether a plaintiff took reasonable steps under the circumstances to maintain the secrecy of information is an issue of fact.”) (*citing Surgidev Corp. v. Eye Technology, Inc.*, 828 F.2d 452, 455 (8th Cir. 1987) (holding “[t]he issue of whether a plaintiff took reasonable steps under the circumstances to maintain the

secrecy of information is an issue of fact.”)). The District Court for the Eastern District of Missouri echoed these principles in *American Builders & Contractors Supply Co., Inc. v. Roofers Mart, Inc.*, 2012 WL 3027848 at *3 (E.D. Mo., July 24, 2012): “‘The existence of a trade secret is a conclusion of law based on the applicable facts,’ but if the facts relevant to that conclusion are in dispute, the finder of fact must first resolve those disputes.” (citing *Reliant Care Mgmt., Co., Inc. v. Health Sys., Inc.*, 2011 WL 4342619 (E.D. Mo., Sept. 15, 2011) (quoting *American Family Mut. Ins. Co.*, 169 S.W.3d at 909–10)). Because there were disputed issues of material facts, this Court should find that the trial court erred in failing to have the jury resolve the issues of fact.

Both Central Trust and SignalPoint clearly disputed material issues of fact at the trial court. The trial court ruled against Central Trust even though it found in Central Trust’s favor on many of the factual issues which supported Central Trust’s trade secrets claim, i.e., (1) Kennedy knew of the client identities through his work at STC; (2) the identity of STC customers has value to those in the trust services industry; and (3) creating a list of such clients without prior knowledge would be difficult and expensive. (LF 1089-1090).

Lastly, and as argued *supra*, “Sections 417.450 to 417.467 shall be applied and construed to effectuate their general purpose of making uniform the law with respect to the subject of trade secrets among states enacting them.” Mo. Rev. Stat. § 417.465 (2012). In the overwhelming majority of states adopting the Uniform Trade Secrets Act, whether information constitutes a trade secret is a question of fact. *See Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F.3d 714, 723 (7th Cir. 2003) (internal quotation

marks and citation omitted) (holding “[A] trade secret is one of the most elusive and difficult concepts in the law to define. In many cases, the existence of a trade secret is not obvious; it requires an ad hoc evaluation of all the surrounding circumstances. For this reason, the question of whether certain information constitutes a trade secret ordinarily is best resolved by a fact finder after full presentation of evidence from each side.”); *see also Progressive Products, Inc. v. Swartz*, 258 P.3d 969, 977-78 (Kan. 2011) (existence of a trade secret is a question of fact); *Marine Pile Drivers, LLC v. Welco, Inc.*, 988 So.2d 878, 881 (La. App. 2008) (existence of a trade secret is a question of fact); *MicroStrategy Inc. v. Li*, 601 S.E.2d 580, 589 (Va. 2004) (same); *Ovation Plumbing, Inc. v. Furton*, 33 P.3d 1221, 1224 (Colo. App. 2001) (same); *A.F.A. Tours, Inc. v. Whitechurch*, 937 F.2d 82, 89 (2nd Cir. 1991); *K-2 Ski Co. v. Head Ski Co., Inc.*, 506 F.2d 471, 474 (9th Cir. 1974); *Penalty Kick Management Ltd. v. Coca Cola Co.*, 318 F.3d 1284, 1291 (11th Cir. 2003); *Bro-Tech Corp. v. Thermax, Inc.*, 651 F.Supp.2d 378, 410 (E.D. Pa. 2009); *Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894, 928 (10th Cir. 1975).

Under either Missouri’s “question of law based on applicable facts” standard or the “question of fact” standard used by the overwhelming majority of courts construing the UTSA, the trial Court’s applied the wrong standard and its decision must be reversed.

II. *A non-complete agreement is not a requirement for protection under the MUTSA.*

Further, the trial court erroneously determined that the “issue involves [nothing] more than the names of the customers/clients” and suggested that STC/Central Trust

should have protected the identity of its customers by using a non-compete agreement. (LF 1090). This too, is not Missouri law. A non-compete agreement is not a prerequisite to protection of client lists and client information under the MUTSA. *See Wilson Mfg. Co. v. Fusco*, 258 S.W.3d 841, 847 (Mo. App. E.D. 2008); *see also Conseco Fin. Servicing Corp. v. North American Mortgage Co.*, 381 F.3d 811, 819-20 (8th Cir. 2004) (applying Missouri law). No provision of the act requires a non-compete agreement for trade secrets to be protected. *See generally*, MUTSA.

III. *Central Trust's Substitute Brief clarifies and raises the same arguments raised in its original Appellant's Brief filed with the Court of Appeals.*

Central Trust raises the exact same arguments it raised, first to the trial court, and second, to the court of appeals. Central Trust merely clarifies its Points Relied On and further clarifies the summary judgment standard and why the trial court and, subsequently, the appellate court erred in upholding summary judgment in SignalPoint's favor. Nowhere in Rule 83.07(b) does it prohibit a party from clarifying its Points Relied On and further refine define its arguments. SignalPoint's argument in this regard is another ruse designed to misdirect this Court's attention away from the real issues to be decided.

IV. *Central Trust has consistently argued its Client Information and Client List are trade secrets under Missouri law.*

Central Trust clearly and sufficiently identified its trade secrets, contrary to the disingenuous position taken by SignalPoint. Central Trust's trade secrets are, and have always been, the Confidential Information and Client Lists containing identities and

confidential information of Central Trust’s clients, as clients of Central Trust. The information contained in this evidence includes the client’s name, address (both business and home in some instances), home telephone number and business telephone number, mobile telephone number, email address, personal information and family information (relatives, etc.). As more fully set forth in its Substitute Brief, this information constitutes trade secrets and is entitled to protection under the MUTSA. Central Trust’s position has never changed, contrary to SignalPoint’s assertions.

V. *Central Trusts trade secrets, its Client Information and Client Lists, are much more than “Customer Contacts” or “Relationships” and are entitled to trade secret protection in accordance with Missouri law.*

SignalPoint’s reliance upon this Court’s *dicta* in *Western Blue Print Company, L.L.C. v. Roberts*, is misplaced. As this Court knows, *Western Blue* did not involve the MUTSA or any claim of trade secret protection. *See Western Blue Print Company, L.L.C. v. Roberts*, 367 S.W.3d 7 (Mo. banc 2012). In *Western Blue*, the appellants’ argued that the circuit court erred in failing to grant their motion for directed verdict or judgment notwithstanding the verdict, arguing *Western Blue* failed to make a submissible case that: (1) the employee breached her fiduciary duty to *Western Blue*; (2) the employee tortiously interfered with *Western Blue*’s ability to renew one of its contracts; (3) the employee committed computer tampering pursuant to section 569.095, RSMo 2002; (4) the alleged conspirator civilly conspired with employee to compete directly against *Western Blue* and (5) the circuit court abused its discretion in awarding *Western Blue* attorneys’ fees. *Id.* Because no trade secret issues were before the court, any

statements regarding trade secrets have no precedential value. *Board of Educ. of City of St. Louis*, 272 S.W.3d at 236. Nowhere in *Western Blue* did this court construe the provisions of the MUTSA or any cases applying the terms of the statute. Absolutely nothing in the *Western Blue* opinion indicates this Court was examining customer information or client lists as trade secrets, or that this Court, after carefully reviewing the MUTSA and cases construing the statute, intended to create sweeping changes in Missouri trade secret law. Yet, this is precisely the interpretation of *Western Blue* SignalPoint urges this Court to adopt. SignalPoint’s expensive view of the case is wrong and should not be adopted by this Court.

Further, Central Trust’s Client Information and Client Lists are not simply “customer contacts.” As argued in Central Trust’s Substitute Brief and herein, *infra* and *supra*, Central Trust presented sufficient evidence demonstrating that the confidential information, the Client Information and the Client Lists, are of a type that may constitute a trade secret. This evidence was sufficient to make out a *prima facie* case under MUTSA’s definition of trade secret. Under Missouri precedent and cases of other jurisdictions construing the UTSA, the jury should have decided whether Client Information and Client Lists are trade secrets.

Central Trust agrees that a client can choose who it wants to do business with as long as that choice was the product lawful means. However, in this case, where the former employee (1) was an officer and director of the former employer; (2) breached his employment contract by soliciting clients of the employer prior to termination of the contract; (3) solicited employees of the former employer to join his “soon-to-be”

established company; (4) stole trade secret information in the form of client identities, as defined above; (5) authorized his lawyer to inform the former employer that he has “not retained any information” of the former employer; (6) lied in discovery responses about possessing such information; (7) failed to produce such information despite clear discovery requests; and (8) at the “11th hour” (within a few weeks of trial), produced the tangible Client Lists containing identities as Central Trust clients and a cell phone with 200 client names and telephone numbers, the case ceases to be about legitimate competition, but is proof of serious violations of law resulting in severe damage to Central Trust. This case is not about protecting relationships, but about defending against the unlawful and predatory use of Central Trusts trade secrets and confidential information by a person who was duty bound to protect the information.

VI. *Central Trust’s Client Information and Client Lists are trade secrets under MUTSA.*

Because SignalPoint cannot distinguish or dispute the numerous cases cited by Central Trust in its Substitute Brief – that the Client Lists and Client Information are trade secrets –SignalPoint disingenuously attempts to mislead this Court in its discussion of the definition of trade secret and in its application of the statutory definition. (*See* Respondent’s Substitute Brief, pgs. 28-32). Section 417.453(4) RSMo. defines “trade secret” as information that “[d]erives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means **by other persons** who can obtain economic value from its disclosure or use....” Mo. Rev. Stat. § 417.453(4) (2013). (Emphasis added). SignalPoint seems to argue

Kennedy's knowledge of the trade secrets was properly gained when he was an employee of STC and, therefore, his use of the information after leaving STC was lawful. Such an interpretation of the MUTSA would negate all of the provisions of the statute and render the MUTSA a nullity. Clearly Kennedy was allowed to use the information as an employee of STC to further the business interests of the company. Once he left the company, his right to use the information ceased. After he left STC, he became an "other person" as referred to above and could not use the information unless he obtained it "by proper means." The evidence created multiple questions of material fact concerning the issue of whether Kennedy's use of the information was lawful. SignalPoint's argument and the position it urges this Court to adopt is wreckless and, unfortunately, intellectually dishonest. SignalPoint's inability to cite any cases in support of its preposterous argument speaks volumes concerning the validity of SignalPoint's position.

SignalPoint also attempts to argue Central Trust's affiliates are "other persons" and that Central Trust's sharing trade secrets with them, precludes trade secret protection. SignalPoint's argument that Central Trust's affiliates are not the same "person" as Central Trust is further evidence that SignalPoint is desperate to divest Central Trust's client's identities of trade secret status. SignalPoint, however, fails to cite any authority for its blanket analysis of "person" under § 417.453 RSMo. Further, a disclosure of one's trade secret that is made to further the owner's economic interests can be a limited disclosure, and if so, does not destroy secrecy. *See Metallurgical Indus. Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1200 (5th Cir. 1986) (holding "that a holder may divulge his information to a limited extent without destroying its status as a trade secret. To hold

otherwise would greatly limit the holder's ability to profit from his secret. If disclosure to others is made to further the holder's economic interests, it should, in appropriate circumstances, be considered a limited disclosure that does not destroy the requisite secrecy”).

As SignalPoint points out to this Court, Central Trust’s affiliates to which it shares certain limited client information are companies related to Central Trust by common ownership or control. There is no evidence that Central Trust’s client list and information regarding its customer’s identities has ever been available to the public. Disclosing such information to affiliated companies under common ownership or control is in Central Trust’s economic interest, is a limited disclosure, and does not destroy the secrecy of its trade secrets.

VII. *SignalPoint misappropriated Central Trust’s trade secrets, and the jury should have decided this issue of fact.*

SignalPoint continues to profess its ignorance of Kennedy’s wrongdoing in misappropriating the client’s identities as Central Trust clients, presumably in hopes to absolve itself from liability for its own misappropriation of these trade secrets and wrongdoing in affiliating with Kennedy. Without SignalPoint, however, Kennedy cannot service Central Trust’s clients. And, without Kennedy, SignalPoint has no knowledge of and access to Central Trust’s clients. The liability of SignalPoint, therefore, goes hand-in-hand with Kennedy’s liability and cannot be separated.

It is undisputed that SignalPoint had the requisite knowledge that Kennedy obtained the Client Information and Client Lists by improper means and that Kennedy

owed STC/Central Trust a duty, as an officer and director of STC, to maintain its secrecy. SignalPoint understood Kennedy would bring clients of STC/Central Trust to SignalPoint if it agreed to affiliate with him. (LF 1015). In addition, SignalPoint had actual knowledge Central Trust believed Kennedy and ITI were misappropriating Central Trust's trade secrets because Central Trust notified SignalPoint through a cease and desist letter dated February 11, 2010, which included a copy of Central Trust's petition in the underlying case. (LF 1015).

The circumstances surrounding Kennedy, ITI and SignalPoint's taking and use of Central Trust's trade secrets should have reached a trial by jury in this matter for determination of the factual issues. However, justice was cut short by the trial court's erroneous application of MUTSA and its interpretation of Missouri law regarding trade secrets. The identity of Central Trust's customers, the fact that she or he has the financial resources to invest, and that she or he is predisposed to use asset management services to manage their portfolios – the type of service that Central Trust provides – are all types of information that are not readily available to the public at large, and which have economic value independent from not being known to other competing investment services companies. All of this information flows directly from knowledge of the client's identity, which Kennedy gained solely through his employment by STC. Consequently, this information is entitled to protection as a trade secret.

Because Central Trust's Client Information and Client Lists constitute trade secrets under MUTSA, SignalPoint knew that Central Trust's client's identities were trade secrets, Kennedy utilized improper means to acquire the trade secrets and Kennedy

acquired it under circumstances giving rise to his duty to maintain its secrecy or limit its use. Alternatively, SignalPoint knew the trade secrets were derived from or through Kennedy who, as an officer, director and employee of STC, owed a duty to STC/Central Trust to maintain its secrecy or limit its use. Therefore, SignalPoint misappropriated Central Trust's trade secrets and is liable for the damages Central Trust has suffered by SignalPoint's misappropriation of the trade secrets.

SignalPoint, together with Kennedy and ITI, made use of Central Trust's trade secrets by acquiring and accepting these clients, providing investment services to Central Trust's clients and receiving profits from providing these services to Central Trust's clients. In fact, SignalPoint induced Kennedy's wrongdoing by associating with Kennedy. Without affiliating with Kennedy and ITI, Kennedy and ITI could not have taken Central Trust's clients. Central Trust presented indisputable evidence that Kennedy and ITI, without SignalPoint, could not have provided financial services to Central Trust's clients without the additional licensing provided by SignalPoint. (LF 1013-1015). For SignalPoint to argue it is an innocent bystander in this dispute is disingenuous.

In addition, SignalPoint's argument that it had no knowledge or reason to know that Central Trust's client information was a trade secret is without merit. SignalPoint admitted to knowing about the underlying lawsuit at its first meeting with Kennedy. (LF 574, 889). Even if SignalPoint did not know Central Trust's client identities were trade secrets prior to February 11, 2011, it certainly knew afterwards because that was the date SignalPoint received Central Trust's cease-and-desist letter. (LF 574, 898-899). Yet SignalPoint, despite receiving a cease-and-desist letter from Central Trust and despite

knowing of the underlying lawsuit when it first met with Kennedy, continued to do business and associate with Kennedy including accepting accounts to service that had been transferred from STC/Central Trust. (LF 1016). SignalPoint did nothing to curtail Kennedy's improper activities but provided Kennedy an avenue to continue misappropriating Central Trust's trade secrets and participated in the misappropriation. Because SignalPoint acquired Central Trust's trade secrets and in doing so knew or had reason to know that the trade secret was acquired by "improper means," SignalPoint misappropriated Central Trust's trade secrets under MUTSA. *See* Mo. Rev. Stat. § 417.453(2) (2012).

VIII. *Central Trust was diligent in discovering the Client Lists and Cell Phone.*

As discussed, *supra*, Central Trust's Client Information and Client Lists are trade secrets under MUTSA. As such, the trial court failed to grant Central Trust's Motion for Reconsideration on this issue. Additionally, the trial court failed to grant Central Trust a new trial on the basis of newly discovered evidence. After the trial court granted summary judgment in SignalPoint's favor, Central Trust's counsel identified the evidence Kennedy and his counsel had concealed which included the Client Lists Kennedy stole from STC and a cell phone containing 200 names and numbers of Central Trust's clients Central Trust's client identities – the tangible proof that Kennedy stole Central Trust's trade secrets. While Central Trust's Client Information is a trade secret under MUTSA without being reduced to a written form, the Client Lists and cell phone information constituted the tangible manifestation and ultimate proof of Kennedy's and, by association with Kennedy and ITI, SignalPoint's wrongdoing.

SignalPoint’s argument that Central Trust was not diligent in discovering the client lists and cell phone concealed in Kennedy’s counsel’s safe deposit box is tantamount to stating that Central Trust should have discovered Kennedy and his counsel’s deceptive, fraudulent and purposeful misconduct in discovery practice and blatant dishonesty before summary judgment was issued in SignalPoint’s favor. Central Trust asked for the information in written discovery 15 months prior to Kennedy’s May 2011 deposition. Kennedy’s responded he did not have any such documents. SignalPoint argues that because Kennedy disclosed for the first time in his May 12, 2011, deposition the existence of the customer list and cell phone, Central Trust should have reviewed the information before summary judgment was entered in its favor.

Missouri law clearly holds there is an element of estoppel involved when a party fails to disclose pertinent information when requested. *See Foerstel v. St. Louis Public Service Co.*, 241 S.W.2d 792, 795 (Mo. App. 1951). The *Foerstel* court held, “The law does not exact perfection on the part of the defendant in uncovering damaging evidence which, if disclosed by plaintiff when called for, would have prevented the compounding of many errors; and the concealment of which in this case misled defendant’s counsel. . . .” *Id.* In *Foerstel*, however, the court found that plaintiff’s counsel had nothing to do with the concealment of the evidence, which is not the case in the underlying lawsuit. *Id.* at 796. When a party has affirmatively misled another party as to a significant matter such as this, it has long been held that less diligence will be required. *See Higgins v. Star Elec., Inc.*, 908 S.W.2d 897, 904 (Mo. App. W.D. 1995). In addition, due diligence is defined as “that degree of assiduity, industry or careful attention called for under the

circumstances of the case and does not require impeccable, flawless investigation in all situations.” *Young v. St. Louis Public Service Co.*, 326 S.W.2d 107, 112 (Mo. 1959).

Because Kennedy and his counsel affirmatively misled Central Trust regarding the existence of the Client Lists and cell phone containing its client’s identities, and given the other circumstances of the case, Central Trust was diligent in discovering the client lists and cell phone. The trial court erred in failing to recognize the Client Lists and cell phone as newly discovered evidence that materially affected its claims not only against Kennedy and ITI, but also SignalPoint. The newly discovered evidence was the tangible manifestation of Central Trust’s client’s identities constituting Central Trust’s trade secrets which SignalPoint misappropriated. The newly discovered evidence entitled Central Trust to a new trial.

CONCLUSION

For the reasons set forth above, Appellant Central Trust & Investment Company respectfully requests this Court reverse, or set aside and vacate, the Amended Summary Judgment Order entered in Respondent SignalPoint Asset Management, LLC’s favor and remand the matter to the trial court so Central Trust may present its claims to a jury. Alternatively, Central Trust respectfully requests this Court order a new trial based upon the newly discovered evidence – the Client Lists and cell phone constituting the tangible manifestation of Central Trust’s confidential information containing the Client Information – and allow Central Trust a new trial on the merits of its claims against SignalPoint.

Respectfully submitted,
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RULE 84.06 CERTIFICATION

The undersigned certifies that the foregoing Substitute Reply Brief of Central Trust & Investment Company includes the information required by Rule 55.03, *Missouri Rules of Civil Procedure*, and complies with Rule 84.06(b), *Missouri Rules of Civil Procedure*. According to the word count function of Microsoft Word by which it was prepared, the foregoing reply brief contains 6,551 words, exclusive of cover, certificate of service, this certification, signature block and appendix.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Substitute Reply Brief of Central Trust & Investment Company was served on the following individuals through the Court's electronic system, to-wit:

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